Hotel Employees and Restaurant Employees International Union, Local 26, AFL–CIO *and* Emma S. Johnson. Case 1–CA–37883

April 29, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 4, 2001, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief, and the Respondent filed an answering brief.

On October 1, 2001, the Board remanded this proceeding in part for further consideration of the judge's credibility determinations. On October 30, 2001, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

We do not reach the remedial issue that is discussed by Member Liebman in her dissent. The General Counsel does not seek the remedy, and the Charging Party never sought it. We recognize that the Board has the power, sua sponte, to impose its own remedies. However where, as here, we are considering a significant and substantial change in remedial policy, we think it important to hear and consider the pros and cons concerning the change. In the instant case, we are not now presented with those views.[3]

In an appropriate case, a charging party can present its view, a respondent can present an opposing view, and the General Counsel can present his views, including any problems he may foresee in regard to implementation of the remedy. We invite parties to present these matters in an appropriate case. We do not now express any views on these matters.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Hotel Employees and Restaurant Employees International Union, Local 26, AFL–CIO, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. April 29, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

A victim of discrimination who receives a lump sum backpay award may incur a heightened tax burden as a result. Today, by declining to order the "tax compensation" remedy originally sought by the General Counsel, the Board wastes an opportunity to align its remedies with the realities of existing tax law and to vindicate the Act's policy in favor of true make-whole relief for discriminatees. Unlike my colleagues, I would deny the General Counsel's motion to withdraw his request for a tax compensation remedy[1]: the General Counsel has not adequately explained his reasons.[2] In any case, the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] On January 10, 2005, the General Counsel submitted a motion to withdraw the request for a special remedy made in the General Counsel's exceptions to the judge's decision. We grant the General Counsel's motion, which is unopposed.

We shall substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F. 3d 534 (6th Cir. 2004).

[3] We recognize that the General Counsel submitted a brief, favoring the remedy, prior to his motion to withdraw the request for that remedy. However, in light of that motion, we do not know whether, or to what extent, the brief continues to reflect the views of the General Counsel.

Chairman Battista notes that there is no reason for his dissenting colleague to be "puzzled" about this matter. Where, as here, a party withdraws from a position, there is at least a suggestion that he no longer adheres to it.

[1] In all other respects, I agree with the majority's holding in this case.

[2] The General Counsel's motion only cites the passage of time and "changed circumstances" as the reasons for withdrawing the request for a tax compensation remedy. The first reason mitigates *in favor of* granting the tax remedy, as the backpay award will be larger due to the

Board is free to consider remedial issues sua sponte. E.g., *Indian Hills Care Center*, 321 NLRB 144 fn. 3 (1996) (modifying Board's standard remedies). We should do so here.[3]

The Internal Revenue Service (IRS) considers a backpay award to be taxable income earned in the year the award is paid, regardless of when the income should have been earned and received.[4] Because of the progressive nature of the Federal and some State income tax structures, discriminatees receiving lump sum backpay awards covering a multiyear backpay period may be pushed into higher tax brackets and owe higher income taxes than if they had received their wages in due course.

A discriminatee who incurs this heightened tax burden currently receives no tax compensation as part of the remedy, and therefore does not receive a full make-whole remedy under current Board law. Until 1986, the Internal Revenue Code and many State tax codes provided for income averaging to mitigate the tax effects of large year-to-year differences in earned income, including lump sum backpay awards. Accordingly, the Board declined to award tax compensation, reasoning that backpay recipients could avoid adverse tax consequences by income averaging.[5] In 1986, however, Congress repealed income averaging. Thus, the Board's previous rationale for denying tax compensation no longer exists.

A make-whole remedy for victims of unlawful discrimination should place the employee in the same position she would have been in had the unlawful discrimination not occurred. "The underlying policy of Section 10(c) of the [National Labor Relations] Act…is 'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.'" *Trustees of Boston Uniiversity*, 224 NLRB 1385 (1976), enfd. 548 F.2d 391 (1st Cir. 1977), quoting *Phelps Dodge Corp. v. NLRB.*, 313 U.S. 177, 194 (1941). Tax compensation is therefore both an appropriate and necessary method for making whole victims of unlawful discrimination.

Had the Respondent not unlawfully fired employee Emma Johnson for exercising her Section 7 rights, she would have obtained her wages over the normal course of her employment and would not be potentially subject to additional tax liability triggered by the backpay award. To make Johnson whole, the Respondent should be required to provide remuneration that would put her in the same position she would have been in absent the unlawful discrimination, i.e., without an additional tax burden.

Several courts have upheld tax compensation to offset increased tax liabilities for lump sum payments to victims of discrimination under other employment statutes.[6] As one court put it, the statutory goal is "to allow [the employee] to *keep* the same amount of money as if he had not been unlawfully terminated." *O'Neill v. Sears, Roebuck & Co.*, 108 F. Supp. 2d 443, 447 (E.D. Pa. 2000). As the General Counsel had originally and persuasively argued, the same reasoning applies in this case.

The Board's longstanding practice of including interest in backpay awards, even though Section 10(c) of the Act does not specifically provide for interest, supports the view that tax compensation is an appropriate part of a make-whole remedy. Just as a discriminatee's loss of the use of her money must be redressed to make her whole, so must a discriminatee who faces a higher tax liability because she received a lump sum payment be compensated accordingly.[7] "The Board has the right to draw on 'enlightenment gained from experience' in fashioning remedies to undo the effects of violation of the Act."[8]

The weakness of the Board's remedies for unlawful discrimination, especially when compared to the reme-

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passage of time. The second reason, "changed circumstances," is entirely unexplained.

[3] The majority states that it is "important to hear and consider the pros and cons concerning the change [in remedial policy]. In the instant case, we are not now presented with those views." That assertion puzzles me. In briefs filed in this case, the General Counsel previously forcefully argued in favor of the remedy, he has said nothing to indicate that his position on the merits has changed, and the Respondent argued against it. In other words, the issue has been squarely litigated and placed before the Board. The briefs are still in our files.

[4] See I.R.S. Revenue Rulings 78-336, 1978-2 C.B. 255 (1978), and 89-35, 1989-1 C.B. 280 (1989); see also *U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001).

[5] *Hendrickson Bros., Inc*., 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985); *Laborers Local 282 (Austin Co.)*, 271 NLRB 878, 878 (1984).

[6] See *Sears v. Atchison, Topeka & Santa Fe Railway Co*., 749 F.2d 1451 (10th Cir. 1984) (racial discrimination under Title VII of the Civil Rights Act of 1964); *Gelof v. Papineau*, 829 F.2d 452 (3d Cir. 1987)(Age Discrimination in Employment Act); *O'Neill v. Sears, Roebuck & Co.*, 108 F. Supp. 2d 443 (E.D. Pa. 2000) (ADEA).

Some courts have recently refused to extend the reasoning of the court in *O'Neill*, above. See *Meacham v. Knolls Atomic Power Laboratory*, 185 F.Supp.2d 193, 238 (N.D.N.Y. 2002); *Anderson v. Consolidated Rail Corp.*, 2000 WL 1622863 (E.D. Pa. 2000). They have done so either because of the employee's failure to provide evidence of the tax consequences of a lump sum backpay award, or because the employee requested tax compensation for nonbackpay damages. Those concerns do not exist in Board proceedings. Thus, the compliance process will determine whether a discriminatee is entitled to tax compensation. In addition, the Board awards no monetary compensation other than backpay. Accordingly, the *O'Neill* court's reasoning is perfectly applicable in Board proceedings.

[7] Other possible tax consequences of receiving lump sum backpay awards, such as exceeding the Social Security wage base or being subject to changing tax rates, can readily be explored in compliance proceedings.

[8] *Isis Plumbing & Heating Corp.*, 138 NLRB 716 (1962), enf. denied on other grounds 322 F.2d 913 (9th Cir. 1963).

dies granted under other Federal employment laws, is notorious. See, e.g., Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1552 (2002) (due to limited remedies, employers view unfair labor practice remedies as a "minor cost of doing business"). We have the authority to provide tax compensation as part of a make-whole remedy. By failing to do so, we diminish the Act's already limited effectiveness in protecting employees who exercise their rights. Accordingly, I dissent.

Dated, Washington, D.C. April 29, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOAR

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or threaten to discharge any employees because they engage in protected concerted activity.

WE WILL NOT impliedly threaten employees with retaliation if they engage in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of this Order, offer Emma Johnson full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Emma Johnson whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Emma Johnson and, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

LOCAL 26, HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL–CIO

A. Susan Lawson, Esq. and *Rachael E. Rollins, Esq.*, for the General Counsel.

Ellen C. Kearns, Esq., Domenic M. Bozzotto, Esq., and *Ellen Guvisser, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. The charge and amended charge in this case was filed on February 9, and June 5, 2000. The complaint was issued by the Regional Director on June 21, 2000 and alleged, in substance, that the Respondent, on or about August 18, 1999, discharged Emma Johnson because of her activity in trying to organize a staff union and/or because of her concerted activities regarding employees' hours of work.

In an amendment to the complaint made at the hearing, the General Counsel seeks as a remedy, an order requiring the Respondent to reimburse any discriminatee entitled to a monetary award, for any extra Federal and/or State income taxes that would or may result from the lump sum payment of the award.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleged, the Respondent, which is a labor organization, admits and I find that it is also an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent, Local 26, is a labor organization which is affiliated with the Hotel Employees and Restaurant Employee International Union, AFL–CIO. It also is an employer, employing clericals, business agents, organizers, researchers, and benefits employees. The President of the Local is Janice Loux and the Secretary Treasurer is Henry Green. (These are the two elected positions.) Also in a supervisory position was Brian Lang, who at the time of the events herein, was the director of organizing. During the period from the spring of 1999 to August 18, 1999, the Union employed about 12 nonsupervisory employees.

In the summer of 1998, Emma Johnson was interviewed by Brian Lang and Dena Lebowitz. During the course of the interview, Lang said that he had heard of some remarks Johnson

had made at a lecture given by Michael Moore in March 1998.[1] It seems that Johnson, at that event, complained about her previous employer (Service Employees International Union), and suggested that employees of unions also needed representation. According to Johnson, at some point during her interview, Lang said that there was no union at Local 26 and added, "there never will be a union at Local 26." Lang testified that he had no memory of discussing the Michael Moore event and denied saying that there would never be a union at Local 26. Lebowitz recalled that Lang did bring up the subject and said some words to the effect that there would not be a union at Local 26. She could not recall if he used the word "never."

Notwithstanding the discussion about in-house unions, and Lang's apparent knowledge that Johnson had made public statements supporting such organizations, Lang recommended that she be hired. She was hired on September 14, 1998 as a researcher.

About 2 months after Johnson started working, her domestic partner, Stephanie Romanos, also interviewed with Brian Lang for a job as an organizer. According to Romanos, during her initial interview, Lang brought up the Michael Moore event and Romanos told him what had happened with Johnson and Moore. On the following day, Ramanos had a meeting with Loux and Lang during which Lang asked Romanos to tell Loux the Michael Moore story. At the conclusion, according to Romanos, Lang stated that there would never be a staff union at Local 26 and Loux said that she didn't understand this "stuff" about a staff union. According to Romanos, Lang then spoke of his experience with a staff union when he was employed by Local 285, SEIU; stating in substance, that having a staff union was detrimental to the operations of a union. Loux didn't say anything at this point. According to Romanos, Loux kind of smiled and nodded as Lang talked. Lang could not recall what was said at the interview or meeting with Loux and Loux denied that they talked at all about staff unions.

Romanos was offered a job as an organizer and she was scheduled to start on January 4, 1999.

Sometime in December 1998, Lang again expressed his negative opinion about staff unions. In fact, he concedes that during a conversation he had with Romanos, she brought up the idea of staff unions and he responded; "Don't get me started on staff unions." Lang testified that he said that he had a "horrendous" experience when he was a member of a staff union at Local 285, SEIU and that he didn't think that staff unions made any sense; that they undercut the mandate that a union had to represent workers. About a week later, Romanos called him to tell him that she was not accepting the job.

Lang certainly was not reluctant to express his opinion about staff unions, for he made similar statements to the recently hired MacKenzie Smith. (She was hired on March 5, 1999.) In this regard, Lang testified that she asked him what he thought about staff unions and he replied that he didn't think that they made sense; that staff unions interfered with the ability of a union to represent employees. Lang placed this conversation in or about March 1999, and MacKenzie Smith thought that it took place in May or June 1998.

In February and March 1999, Local 26 hired a number of employees including Mark Parker, Yovani Hernandez, Mackenzie Smith, Calvin Wu, and Laura Regis. According to Johnson, she approached each of these individuals and asked them whether they would be interested in organizing a staff union. This met with a rather lukewarm response although Wu clearly was interested as he thought that this might be a way of getting a company car. Parker, on the other hand merely indicated that he would sign an authorization card but would not otherwise get involved.

Although Johnson testified that she broached the subject of organizing a staff association, she and others testified that this was spoken about in secrecy as she didn't want management to know what was going on. Moreover, the talk never really got beyond the expression of an idea and no steps were ever taken to actually form such an organization. At best, the idea of organizing a staff union remained inchoate.[2] And the statement that Lang made about staff unions, probably occurred before Johnson even began talking about this idea with other employees.

In my opinion, there was insufficient evidence to establish, with any degree of probability, that Lang or Loux or any other supervisory or managerial person associated with Local 26, was aware that Johnson or anyone else was talking about the formation of an inside union.[3]

In May 1999, Johnson and Parker were given written evaluations by Marty Leary who was the research supervisor for the International Union. Although he worked mostly in Washington D.C., he did come to Boston from time-to-time to work with Local 26 and the researchers.[4] Leary also reviewed their work which was sent to him. This evaluation took place at a time when the management of the Union was not aware of Johnson's union activities and before any of the alleged concerted activities. In my opinion, the evaluations of both individuals were mediocre and although both received a similar overall grade, Leary attributed different strengths and weakness to each person. In Johnson's case, he stressed that she needed to follow through on her research and show more initiative in

[1] Michael Moore was the director of a somewhat popular movie where he chased around and tried to get an interview with the CEO of General Motors.

[2] Johnson did testify that she obtained some collective bargaining agreements and some authorization cards to use as models. But this activity was undertaken on her own and was not part of a concerted effort by her and other employees to form a labor organization.

[3] The General Counsel seeks to ascribe knowledge of Johnson's union activity to the Respondent largely by way of what is called the "small plant" doctrine. In my opinion, the evidence here cannot support this conclusion. In *Coral Gables Convalescent Home*, 234 NLRB 1193, 1199 (1978), the Board stated that knowledge can be inferred if union activities at a small plant "were carried out in such a manner or at times that in the normal cause of events, Respondent must have noticed them." If however, the alleged discriminatee made efforts to hide his or her activity, then the General Counsel can't use the small plant doctrine to infer knowledge. *Bryant & Cooper, Milcraft Furniture*, 282 NLRB 593, 607 (1987); *K & B Mounting*, 248 NLRB 570, 571 (1980); *Friendly Markets*, 224 NLRB 967, 969 (1976).

[4] Mainly, they did corporate research, principally directed to hotels that either were already established in Boston or were in the developmental process.

developing sources of information. This is not to say that the evaluation was poor or that he (or Loux), indicated in any way that Johnson's work was cause for alarm or if, unimproved, could lead to her termination.

In June 1999, a labor dispute arose between Local 26 and the Logan Airport Ramada Inn which was owned by Hilton Hotels. As this involved a plan to close the hotel and reopen it in August, with no right of employment for the old employees, the Union viewed this with the utmost urgency.

Having participated in negotiations with the Hotel without much success, Loux announced to the Union's staff on July 12, that commencing immediately, they should put their vacations on hold because the Union was going to embark on a corporate campaign against the Hotel which would include handbilling at the Hilton Hotel in the Backbay area of Boston on a 7-day per week basis.

Loux made up a schedule pursuant to which all union employees were required to handbill in pairs, for 2 hours each day, 7 days a week. The hours were rotated so that over a period of time, each pair would leaflet at different hours during the day. Also, Loux made it plain that this schedule was fixed and that employees could not switch their assignments between themselves. Also, the employees were told that they should be at their posts a half hour early and that they should remain until relieved by the next shift. Parker and Johnson were assigned as a team.

During the leafleting, employees were reminded by Loux that they were not to place leaflets or their own possessions, (such as backpacks, coffee cups, etc.), on hotel property. (This included the flower pots outside the entrance.) This was in order to prevent any legal challenge by the Hotel to the Union's activity.

During the leafleting period, employees were expected to carry out their normal work as well, albeit Leary acknowledged that he understood that the researchers' normal work would be impeded by this activity.

During the second week of the leafleting campaign, Johnson asked Loux if staff members could swap shifts and she was told that they could not. Thereafter, Johnson started to talk to other employees about the leafleting schedule, suggesting that they should be allowed to swap shifts.[5] Johnson also devised an alternate schedule which she talked about with some of the other employees. This involved having a single 4-hour shift on the weekends so that each person could have one day off each weekend. Some employees indicated to her that they were interested in this idea and some indicated that they were not.

Unlike the situation with the staff union idea, Johnson's complaints about the leafleting schedule did come to the attention of Loux. In this regard, Calvin Wu testified that in July, Loux told him that Johnson had complained about the schedule and that she (Loux), asked him and McKenzie Smith if they preferred a two or a 4-hour shift. (He testified that they both said that they preferred one, 4-hour weekend shift.) Smith testified that at a staff meeting in late July, Loux said that she heard grumbling on the picket line and that she knows that people were getting frustrated but that we were going to get through this kind of thing. Johnson testified that at a different staff meeting in late July 1999, she asked Loux if the employees could switch with each other. Johnson also testified that she said that the weekends were becoming a big issue and suggested the idea of having one, 4-hour shift per weekend. According to Johnson, Loux's response was negative to both ideas.

According to Johnson, after the meeting noted above, she prepared a document containing an alternative leafleting schedule and left it with Loux, who said that she would look at it later. The cover memo read:

> Janice, could we do weekend shifts of 4 hours each, thus letting everyone have one weekend day off? One person would do 4 hours one weekend day and none the other day? Or, if not, could those who want to, switch with each other so that they do a 4 hour shift one weekend day and take the other weekend day off? Then get it approved by you. Emma.

On Friday evening, July 30, 1999, Loux turned down Johnson's request to take off on Saturday morning, even if Johnson could find someone to take her shift. In response, Johnson states that she told Loux that she thought it was unfair that Loux had taken a vacation 2 weeks before the leafleting began and then telling employees that they couldn't have a single day off during the summer. Johnson testified that on the following day, Loux spoke to her on the picket line and said that if she needed a day off, this could be accommodated. According to Johnson, Loux said; "You know, Emma, we need to pull together. This picket line is really important. We really have to stay together and be strong."

On Saturday, July 31, 1999, Loux fired Jovanni Hernandez because he refused to work an extra leafleting shift on that day. (Clearly Loux considered the picket line to be of paramount importance.)

According to Johnson, she again raised the scheduling issue at a staff meeting on August 5, 1999. She asserts that Loux got really angry and said that they cannot talk about scheduling and that there would be no changes. According to Johnson, Loux said, while slamming her hand on the table: "No, I am the boss. I make the rules."

On August 6, 1999, Loux negotiated a settlement with the Hilton Hotel and the leafleting activity was called off.

Everyone went back to work and Loux left for business in Las Vegas. Loux returned to Boston on August 16, 1999 and fired Johnson on August 18, 1999.

Marty Leary testified that in July 1999, he received several calls from Loux who complained about Johnson's work. One of her complaints, according to Leary, was that Johnson was not producing one page descriptions of hotel projects while Parker was able to do this even during the leafleting activity. He testified that Loux complained that she had noticed a change in Johnson's enthusiasm for the job and that she was not putting in the hours that she had done before.

According to Leary, he received another call from Loux at the end of July 1999, where Loux said that she was at the end

[5] In actuality, Loux did permit employees, on an as needed basis, to switch shifts if she approved the change. However, she clearly was not going to approve a system whereby employees could switch shifts by themselves.

of her rope with Johnson and that she was seriously thinking of terminating her. Leary asked why and Loux said that Johnson had a temper, and that she wasn't putting in the time. Leary testified that Loux complained about the way Johnson was reacting to the crisis with the Hilton Hotel. He testified *that Loux said that Emma was unhappy about the 2-hour per day picket line schedule that Loux had developed, and had been complaining about it and wouldn't stop*. (Emphasis added.)

On August 16, Johnson was sent to a research conference in Washington D.C. This also was the day that Loux returned to work.

On August 18, Johnson called Loux to ask for a vacation but when she went to Loux's office she was told that she was being let go. According to Johnson, Loux said that although she considered Johnson to be a good researcher, she didn't like Johnson's attitude on the picket line. Johnson was told that her termination would be treated as a layoff, that she would get two week's pay and that she would get a good recommendation.[6] Loux told Johnson that this was her last day and that she should go upstairs, get her stuff and leave.

Calvin Wu testified that some time shortly after Johnson was fired, Lang told him and McKenzie Smith that Johnson had been fired because of her complaint about the Hilton campaign. Neither Lang nor Smith could recall this remark.

Janice Loux testified that she decided to discharge Johnson because her work declined both in quality and quantity, that her overall attitude was poor and that Johnson was not carrying her weight in the Hilton campaign. More specifically, she noted, as did Leary, that Johnson, during the summer, no longer was producing what they called one page hotel reports whereas Parker, her co-researcher, was able to continue doing that work. Loux testified that on some occasions, Johnson did not arrive on time for the picket line and sometimes took long breaks to go the bathroom at the Sheraton Hotel next door.[7]

Johnson denies that she did not do her work properly and to the extent that she would concede that her productivity went down, she attributes that to the handbilling activity which impeded her normal assignments. And in this regard, Leary agreed that the handbilling campaign would have impeded Johnson's normal research assignments.

III. ANALYSIS

Based on the evidence as a whole, I do not think that the General Counsel has made out a prima facie case showing that Emma Johnson was discharged because of her union activities. For one thing, her activities were minimal and consisted only of talking to other employees about whether or not it would be a good idea to form an independent staff association. No steps were taken to form such an organization and there was no evidence that the Respondent's management were aware of this talk. I will not rely on the "small plant doctrine" to attribute knowledge of essentially inchoate union activity to the employer. The talk, to the extent it was undertaken, was kept private and Johnson made an effort to keep such discussion under management's radar screen.

The allegation that Johnson was discharged for protected concerted activity is an altogether different matter.

Johnson talked to other employees about her proposals to change the picketing schedule. Her idea was that employees should be allowed to switch assignments and that on weekends, employees should be given one 4-hour shift rather than two, 2-hour shifts. Some of the other employees agreed with her and others didn't. The evidence shows that Johnson raised this subject as a matter of concern for herself and other employees and that she went so far as to draw up an alternative schedule which she submitted. Loux was aware of this activity and she specifically addressed the question of schedules during a staff meeting.

A proposal or complaint made by an employee in relation to her own *and* other employees' concerns about work schedules, which involves hours of work, is protected concerted activity within the meaning of Section 7 of the Act. *Aroostook County Regional Ophthalmology Center*, 317 218, 220 (1995). (Employee discussions about schedule changes constitute concerted action); *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265–266, 149 LRRM 2094 (9th Cir. 1995). (Employees who complained about schedule changes and refused to work extra hours were engaged in concerted, protected activity.) See also *Compuware Corp. v. NLRB*, 134 F.3d 1285, 157 LRRM 2346 (6th Cir. 1998).

Moreover, the General Counsel need not show that all of the affected employees encompassed by the complaints were in agreement with the position taken by the employee who raised the matter with the employer. *Belle of Sioux City*, 333 NLRB 98, 104–105 (2001); *Circle K Corp.*, 305 NLRB 932, 933 (1991); *Whittaker Corp.*, 289 NLRB 933, 934 (1988). Nor must it be shown that other employees specifically authorized or appointed the employee to raise the matter with the employer. See *NLRB v. Talsol Corporation*, 155 F.3d 785, 797, 159 LRRM 2193, 2200 (6th Cir. 1998), enfg. *Talsol Corporation*, 317 NLRB 290, 315–317 (1995), and citing *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1288–1289 (6th Cir. 1998); *West Texas Hotels, Inc.*, 324 NLRB 1141 (1997); *Salisbury Hotel*, 283 NLRB 685, 686–687 (1987); *Every Woman's Place*, 282 NLRB 413 (1986), enfd. 833 F.2d 1012 (6th Cir. 1987).

I am convinced that Janice Loux is a strongly committed labor leader who, during the Hilton campaign, was engaged in a fight which potentially could have had, if she was not successful, a very serious impact on the Union's ability to organize and represent employees in Boston's hotel industry. She was wholly involved in this campaign and it is not surprising that she expected her own employees to be equally committed to this crucial fight.

The problem, I think, is that Loux construed Johnson's complaints about the handbilling schedule as an indication of Johnson's lack of commitment to the campaign. While this might be somewhat understandable, it doesn't mitigate against a conclusion that if this was the reason for Johnson's discharge, the

[6] The Union did not challenge Johnson's unemployment insurance claim.

[7] Mark Parker testified that when Loux told him that she had fired Johnson, he responded that it was about time. His testimony was offered to corroborate the testimony of Respondent's other witnesses that Johnson was not productive. It should be noted, however, that Loux did not know of or rely on Parker's opinion of Johnson's work in making a decision to discharge her.

Union, as Johnson's employer, would have violated Section 8(a)(1) of the Act.

To my mind, the testimony of Leary, shows that Johnson's complaints about the handbilling schedule were the primary reason that Loux decided that Johnson had to go. Leary testified that Loux telephoned him in July 1999, and said that she was thinking of discharging Johnson. Leary stated that Loux complained about the way Johnson was reacting to the crisis with the Hilton Hotel and he further testified that Loux said that Emma was unhappy about the picket line schedule, that she had been complaining about it and wouldn't stop.

The Respondent contends that even if Johnson's activity could be considered to be protected and concerted activity, it nevertheless would have discharged Johnson for legitimate business reasons. It essentially contends that Johnson was not productive and was not doing her job properly.

Under *Wright Line*, 251 NLRB l083, (l980) enfd. 622 F.2d 899 (1st Cir. l98l), cert. denied 495 U.S. 989, once the General Counsel has established a prima facie showing of unlawful motivation, the burden is shifted to the Respondent to establish that it would have laid off or discharged the employee for good cause despite his or her union or protected activities.

During Johnson's entire tenure at the Respondent, she was given one written evaluation (May 1999), which was generally satisfactory. She never received any written or oral warnings about her work and there is no evidence that Respondent's management ever made any written notation of her alleged shortcomings. Neither Loux, Lang nor Leary ever sat down with her to tell her that she was neglecting her work or that the job she was doing was deficient.

Based on the above, I cannot conclude that the Respondent has met its burden under *Wright Line* and I therefore conclude that Respondent violated Section 8(a)(1) of the Act by discharging Emma Johnson.

Based on the credited testimony of Calvin Wu, I also conclude that Brian Lang, Respondent's agent, told him that Johnson had been discharged because of her complaints about the Hilton campaign. Since I have concluded that Johnson's complaints involved the scheduling of employee's hours of work and therefore constituted protected concerted activity, Lang's statement therefore could reasonably be construed by Wu as an implied threat of retaliation for engaging in such activities. *Whayne Supply Co.*, 314 NLRB 393, 402 (1994); and *Wells Dairy, Inc.*, 287 NLRB 827, 834 (1987).

CONCLUSIONS OF LAW

1. The Respondent, Local 26, Hotel Employees and Restaurant Employees International Union, violated Section 8(a)(1) of the Act by discharging its employee Emma because of her protected concerted activity.

2. The Respondent, violated Section 8(a)(1) of the Act by telling an employee that another employee had been discharged because of her complaints which were protected concerted activity.

3. The unfair labor practice found herein affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Emma Johnson, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of her discharge to the date of her reinstatement or a valid reinstatement offer, less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1977).

In an amendment to the complaint, the General Counsel requested that I modify the traditional remedy to take into account the potential adverse impact that Federal and State income tax laws might have on the discriminatee's backpay. It is argued that if the backpay amount is paid all in one year it could thereby increase the discriminatee's income tax liability by raising his or her tax bracket. (It seems that the IRS does not pro rate income received from a backpay award even though the amount may represent payments for lost earnings over a multi-year period.)

Whatever the merits of this argument, there is no precedent in its favor and I feel that it would be best left to the Board to deal with this kind of question.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Local 26, Hotel Employees and Restaurant Employees International Union its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or threatening to discharge employees who engage in protected concerted activity.

(b) Impliedly threatening employees with retaliation if they engage in protected concerted activity.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Emma Johnson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Emma Johnson and within 3 days thereafter, notify her in writing, that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Boston Massachusetts, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 18, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 4, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or threaten to discharge any employees because they engage in protected concerted activity.

WE WILL NOT impliedly threaten employees with retaliation if they engage in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL**,** within 14 days from the date of this Order, offer Emma Johnson, full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Emma Johnson and within 3 days thereafter, notify her in writing, that this has been done and that the discharge will not be used against her in any way.

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEE INTERNATIONAL UNION, LOCAL 26, AFL–CIO

A Susan Lawson Esq. and *Rachael E. Rollins Esq.,* for the General Counsel.

Ellen C. Kearns Esq., Domenic M. Bozzotto Esq., and *Ellen Guvisser Esq.,* for the Respondent.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. By Order dated October 1, 2001, the Board remanded this case to me for further findings and conclusions. Thereafter, by letter dated October 4, 2002, I notified the General Counsel and the Respondent that if they chose to do so, they could file supplemental briefs by October16, 2001. I also notified them that given the uncertainty as to the outcome, it might be more practical to explore the possibility of settlement. Subsequently, I left a voice mail message with the General Counsel to advise me as to whether there was any possibility that this matter might be settled. By voice mail of October 19, 2001, she advised me that no settlement was forthcoming. Accordingly, I hereby issue the following supplemental findings and conclusions.

I conclude that Emma Johnson's testimony was detailed and credible. To the extent that her testimony conflicted with that of Janice Loux, I shall credit Johnson. I therefore credit Johnson's assertion that at her termination interview, Loux did not mention anything about any deficiencies in Johnson's work performance or raise any issue regarding the way that Johnson engaged in leafleting activity. I also credit Johnson's testimony that to the extent that her creation of "one page" reports were reduced or eliminated during the Hilton campaign, this was caused by her other assignments during this period, including special assignments. Thus, it is my opinion, based on Johnson's credited testimony, that with the exception of these one-page reports, Johnson did the work assigned to her. I also credit Johnson's testimony that she followed Loux's directions regarding the conduct of the handbilling activity and that she showed up on time and continued to engage in that activity during her assigned shifts.

The evidence, through the testimony of the Respondent's own witness, Marty Leary, shows that the primary reason that

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Loux decided to discharge Johnson was because Johnson had made an effort to convince other employees to concertedly complain about the picket line schedules insofar as they affected their hours of work. Although Leary testified that in July, Loux complained about Johnson's attitude and work, he also testified that later in the same month, when Loux, for the first time, told him that she was thinking of firing Johnson, she said *that Emma was unhappy about the two-hour per day picket line schedule that Loux had developed, and had been complaining about it and wouldn't stop.* (Emphasis added).

Additionally, given the credited testimony of Union Organizer Calvin Wu, who testified that Brian Lang, Respondent's organizing director, told him that Johnson had been discharged because of her complaints about the Hilton campaign, this goes a long way toward establishing a forceful prima facie case. And even though Lang testified that he played no role in the decision to fire Johnson, I find it difficult to believe that Loux would not have told him why she had discharged Johnson after the fact. This is, after all, a small organization and Lang was part of the Union's management staff. Lang's statement to Wu after the discharge, was certainly consistent with Leary's testimony regarding what Loux told him before Johnson was fired.

Given a strong prima facie case, the Respondent now has the burden to show that it would have discharged Johnson irrespective of her protected concerted activity. Under *Wright Line*, 251 NLRB l083, (1980) enfd. 622 F. 2d. 899 (1st Cir. l981), cert. denied 495 U.S. 989, once the General Counsel makes out a prima facie case, she does not carry the burden of showing that the Respondent's asserted other reasons for discharge are pretextual. Even assuming that the Respondent's motivation in discharging the individual is, *in some part*, motivated by legitimate reasons, the Respondent nevertheless carries the burden of proving that the discharge would have occurred anyway for legitimate reasons, despite that part of the its motivation which would be considered to be illegal. In my opinion, the Respondent has not carried this burden.

I have already credited Johnson's testimony regarding her adherence to the instructions respecting the leafleting activity. And while Loux seems to place a good deal of emphasis on Johnson's asserted lack of enthusiasm for the Hilton campaign, her testimony in this regard is somewhat intangible. For example, she testified that in meetings, Emma would sometimes huff about a particular assignment or "she didn't agree with what I was saying." Loux went on to testify that she could tell by Johnson's facial expressions that she didn't seem to agree with the strategy or the assignment.

Loux also placed great emphasis on the failure of Johnson to do the one-page reports which Johnson's coworker Parker continued to do during the Hilton campaign. Nevertheless, it seems to me that the one-pagers did not have a high priority during this period of time and that Johnson was assigned to other more important things to do in relation to the campaign. With respect to the one-page reports, Johnson credibly testified that during the period of the Hilton campaign, she was not asked about these reports by either Leary or Loux and did not receive any criticism about this issue.

Loux complained about Johnson's attitude, bad temper, and lack of enthusiasm for the job. But my opinion is that this criticism is inextricably related to the fact that Johnson made herself a pest in Loux's eyes by continually complaining about the scheduling of the leafleting schedule. Johnson may have been an irritant to Loux because she was challenging the schedule; but that irritating activity by Johnson is protected by Section 7 of the Act.

Johnson credibly testified that at no time during the period of her employment did she receive any warnings or criticisms regarding any aspect of her work performance. Indeed the only written evaluation of her was positive. Nor could the Respondent produce any written memoranda, warnings or other documentation to corroborate Loux's assertion that Johnson was not properly doing her job.

Whether or not Loux had, in the past, discharged other employees without prior warnings does not in my opinion, do much to bolster the Respondent's defense. The point is that once the General Counsel has made out, as she has in this case, a prima facie showing that the motivation, in whole or in part, for Johnson's discharge was because of her protected concerted activity, the Respondent has the burden of proving that its asserted reasons for the discharge were legitimate and that it would have discharged Johnson anyway, notwithstanding her protected activity.

I simply do not think that the Respondent has sustained its burden and in the end, I do not believe Loux's testimony as to the reasons that she gave for Johnson's discharge.

Accordingly, I reaffirm my original Decision and Recommended Order as modified below.[1]

In light of *Ferguson Electric Co*., 335 NLRB 142 (2001), Paragraph 2(c) of the Recommended Order should be modified to read as follows:

> Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

Dated, Washington, D.C. October 30, 2001

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.